FEBRUARY 24. 1766.

ANSWERS

FOR

Doctor ANDREW HERON;

TO THE

PETITION of JOHN VINING-HERON Esq, Merchant in *Portsmouth*.

IN theſe anſwers the reſpondent ſhall bring under the view of the court, the ſeveral deeds which were executed by *Andrew Heron* of *Bargaly*, grandfather to the petitioner and reſpondent, ſo far as that is neceſſary for making the cauſe underſtood: And when that is done, and ſome facts miſrepreſented in the petition, ſet right, the anſwer to the argument in law will become an eaſy matter, and it is imagined that your Lordſhips will be clearly of opinion, that the cauſe has been well decided by the Lord Ordinary.

Andrew Heron owner of the eſtate of *Bargaly*, was ſeized therein, in virtue of a charter expede in 1691, and by that, and all other inveſtitures known to the reſpondent, the lands ſtand deviſed to *heirs and aſſignies whatever*, and not to *heirs male*, as the petitioner ſeems to ſuppoſe. 13

Bargaly had iſſue two ſons, *Andrew* and *Patrick*, and one daughter *Jean*.

Bargaly was a near relation of the family of *Heron* of *Heron*, and appears to have been much under the influence of *Patrick Heron*, grand-

grandfather to the preſent repreſentative of the family of *Heron* of *Heron*, who appears rather to have had too ſtrong a deſire to come at the property of the eſtate of *Bargaly*, which led him to uſe his influence with his friend in ways that had better been let alone: but the reſpondent has no deſire to rake up the aſhes of the dead, and he thinks the invectives in the petition againſt the conduct of Mr. *Heron* of *Heron* might have been ſpared in the preſent queſtion, as they have no tendency to ſupport the petitioner's argument. On the contrary, if any concluſion is to be drawn from the influence Mr. *Heron* had over *Bargaly*, it only operates in favours of the reſpondent.

Entail. 24. Jan. 1715.

The firſt deed which appears to have been executed by *Bargaly*, by the influence of Mr. *Heron*, is the ſettlement or deed of entail 1715, under which the petitioner now claims the eſtate of *Bargaly*.

The deed is wrote by *Bargaly* himſelf at *Kerochtree*, the houſe of Mr. *Heron* of *Heron*, and proceeds upon a narrative in the following words: "Be it kend to all men by thir preſents, "me *Andrew Heron* of *Bargaly*, for *the love and affection* I "have and bear to *Andrew Heron*, my eldeſt lawful ſon, pro- "create betwixt me and the deceaſt *Mary Graham* my ſpouſe, "and to the other heirs particularly afternamed; and alſo the "good and preſervation of my family and memory, and for "other juſt and reaſonable cauſes, grave and weighty conſi- "derations moving me." And by the deed he diſpones the lands of *Bargaly*, "To and in favours of *Andrew Heron* his "eldeſt ſon, and the heirs male lawfully procreated or to be "procreated of his body; whom failing, to *Patrick* "*Heron* his ſecond ſon, and the heirs male procreate or to be "procreate of his body, whom failing, to *Patrick Heron* of "that ilk his ſecond ſon, if he has any, or to the eldeſt ſon, "failing him, lawfully procreate of his body; whom failing, "to *Jean Heron* his only daughter, and the heirs male of her "body."

The

The deed contains a reſervation of the granter's liferent, and a power and faculty at any time of his life, by a writ under his hand, " To affect and burden the fee of the ſaid lands with " what ſums of money and annuities he ſhould think fit." The deed declares it unlawful for *Bargaly*'s two ſons, and their heirs male, to alienate the lands to any perſon but *Patrick Heron* of that ilk, and his heirs male, they paying a price for the lands not exceeding twenty years purchaſe. Then follows an irritancy of all other deeds of alienation; and the deed concludes with a clauſe of warrandice from fact and deed in the terms ſet forth in the petition.

Bargaly, moſt probably actuated by the ſame influence as is ſuggeſted in the petition, did execute another deed or ſettlement different from the former only by the enlargement of his own powers, and by a clauſe for ſecuring more effectually the eſtate to the family of *Heron*.—By the firſt of theſe clauſes, *Bargaly* reſerves power to himſelf, " at any time of his " life to ſell, annalzie, wadſet, diſpone, contract debts, and do " every thing requiſite and neceſſary anent the ſaid eſtate, " without the advice and conſent of the forenamed perſons, " ſicklike and as freely in all reſpects, as he might have done " before the making thereof."—By the other, in favours of *Heron*, he provides and declares, " That albeit my ſaid ſons, " or their heirs, or any others of the members of tailzie a- " bove mentioned, ſhould happen to contract debts, whereby " the ſaid lands or any part thereof ſhould be evicted from " them by legal diligence, and brought by the ſaid creditors " to a roup and ſale; then and in that caſe it ſhall be in the " power of the ſaid *Patrick Heron* to purchaſe the ſaid lands " and others above mentioned at the ſaid roup for payment of " the price above written (*i. e.* twenty years purchaſe) and " no more; and that it ſhall be in the power and option of the " ſaid *Patrick Heron* to intent proceſs of declarator, or any " other proceſs he ſhall think fit, and thereupon to execute inhi- " bition againſt my ſaid ſons, or any of the perſons above mentioned,

Entail. 1. Feb. 1716.

" ned, in order to incapacitate them from contracting more " debts than the price will amount to, ſo that the clauſe con- " ceived in his favours may be thereby made effectual."

The petitioner ſays, " That he knows not how this laſt " deed was deſtroyed, but that it is reaſonable to ſuppoſe that " it was the reſult of Laird *Heron*'s after contrivances, when " he found it could not be effectual, by reaſon of the previ- " ous diſpoſition 1715." And which he likewiſe ſuppoſes to have been delivered to his father *Patrick Heron.*

As the petitioner underſtands both deeds to have been the effect of the influence which Laird *Heron* had over *Bargaly*, it is not likely, that Laird *Heron* would have agreed to the delivery of the deed 1715, and which at any rate would not have fallen to be delivered to *Patrick*, but to *Andrew* his elder brother; and there is not the leaſt reaſon to ſuſpect, that ever the deed was in the poſſeſſion of *Andrew*; nor is it true, that the deed of 1716 was deſtroyed during the life of *Bargaly*, of which there is undoubted evidence, *viz*, an inventary of the principal writings found in *Bargaly*'s repoſitories at the time of his death, bearing to be taken by the commiſſary in preſence of the friends, and which inventory is ſubſcribed by the commiſſary, and contains the following article: *Item, Diſpoſition by way of tailzie, with-irritant and reſolutive clauſes, made by the deceaſt* Bargaly, *in favours of* Andrew Heron *his eldeſt ſon, and the heirs male of his body; which failing, his other heirs therein condeſcended upon, of all and haill the lands of* Bargaly, Barhoiſe, *and* Daleſhcairns. *This is dated 1ſt* February 1716 *years, and regiſtrate in the particular regiſter of tailzies,* &c. *kept at* Edinburgh, *the 9th of* February 1716.

Heron having begun, about the dates of theſe deeds of ſettlement, to advance money to *Bargaly*, various writings, at different periods, were executed in favour of *Heron*; and more particularly, *Bargaly*, in 1720, did, upon a narrative of *Heron*'s having advanced to him 8026 *l.* 13 *s.* 4 *d. Scots*, ſaid to be more than 26 years purchaſe of the lands of *Bargaly*,

galy, diſponed the lands abſolutely and irredeemably to *Heron* and his heirs, reſerving his own liferent of the lands, a liferent of a part to his wife, and a power to diſpoſe of the weedings of the wood upon the eſtate. June 21. 1720.

Whether any, or what counter deed was granted by *Heron* on this occaſion, is unknown; but the diſpoſition was departed from; and in 1724, *Bargaly*, when at *Heron*'s houſe, wrote another diſpoſition with his own hand, much in the ſame terms, only bearing, that *Heron* had advanced to *Bargaly* 9600 *l. Scots*, ſaid in the diſpoſition to be 31 years purchaſe of the lands. Sept. 14. 1724.

The diſpoſition was qualified by a back bond, declaring the lands redeemable by *Bargaly* during his life, or by either of his two ſons within ſeven years of his death, upon payment of the price and annualrent, with a proviſion, that the re-diſpoſition to be granted to *Heron*, ſhould be a *ſtrict entail*, ſettling the eſtate upon *Heron* himſelf and his heirs after the failure of *Bargaly* and his heirs male; and there are in the back bond, ſome uſurious ſtipulations for ſwelling the price, to be repaid in the event of a redemption, which it is unneceſſary here to ſet forth more particularly, as the principal ones are recited in the petition.

Patrick, *Bargaly*'s ſecond ſon, called in the petition Captain *Patrick*, having arrived from foreign parts, where he had made ſome money, it appears to have been ſettled between him and his father, that he was to relieve his father of the 950 *l.* due to *Heron*, and that his father was to ſettle the eſtate upon him in liferent, and his ſecond ſon in fee, under certain reſervations and conditions.

Accordingly a diſpoſition was executed in the following terms: " Foraſmuchas Captain *Patrick Heron*, my ſon, is " to relieve me of the ſum of 950 *l. ſterling* money, due " by me to *Patrick Heron* of that ilk, my nephew, and for " which ſum the ſaid *Patrick* hath an heritable ſecurity up- " on the lands of *Bargaly* and others, the which ſums ex- Jan. 4. 1726. Diſpoſition in favours of Dr. Heron.

" tend to 19 years purchaſe of ſaid lands; upon payment " of which, the ſaid *Patrick Heron* is to denude himſelf of " all right to the ſaid lands: Therefore to have ſold, an- " nalzied, and diſponed to and in favours of the ſaid Cap- " tain *Patrick Heron* my ſon, in liferent, *and to* Andrew " Heron *his ſecond lawful ſon, in fee;* which failing, to a- " ny other of his ſons he ſhall think fit, heritably and irre- " deemably, the lands of *Bargaly* and others, reſerving al- " ways my own liferent right and uſe of the ſaid lands, du- " ring all the days of my own lifetime, and to *Elizabeth* " *Dunbar* my ſpouſe, in caſe ſhe ſurvive me, her liferent uſe " of the lands and teinds of *Dallaſhcairns*."

It is ſaid in the petition, " That this diſpoſition was a " contrivance between Laird *Heron* and *Bargaly*, to induce " *Patrick* to pay the 950 *l.* And that with this view the " diſpoſition was entruſted to *Heron* to be carried to *London*, " to ſee if he could be prevailed with to come into theſe " terms."

In paſſing, it may be proper to obſerve, that all this is ſaid, without being in the leaſt ſupported by evidence; and that there is no reaſon to believe that ever the diſpoſition 1726 was in the cuſtody of Laird *Heron.* And as to what is ſaid in the petition, of the diſpoſition's having been left by *Heron* in his agent's hand at *London*, whom he had employed to negotiate the treaty with Captain *Patrick* in his abſence; it is amazing that ſuch an averment ſhould be ventured upon, when it ſtands ſo clearly eſtabliſhed by Laird *Heron*'s letters annexed to the petition, and particularly that of the 19th *July* 1728, that Laird *Heron* was not then ſo much as acquainted with Mr. *Willis*, the ſuppoſed agent, and who was then the agent or attorney of Captain *Patrick*.—But of this, more particular notice will fall hereafter to be taken.

The *next* deed ſaid in the petition to have been executed by *Bargaly*, is a diſpoſition in 1728, whereby the fee of the

the eſtate was to be veſted in Captain *Patrick*, in place of the reſpondent his ſecond ſon, as done by the diſpoſition 1726.

It appears from the oath emitted, and the account exhibited by *James Scott* the writer, contained in the excerpts annexed to the petition, that a diſpoſition having been made out upon ſtamp paper, to be executed by *Bargaly* in favours of *Patrick*, but there is no certainty of the diſpoſition having been ſubſcribed: And however that may be, the petitioner has carefully avoided informing your Lordſhips, that the reſpondent's right to the eſtate would have been equally good by that diſpoſition, as by the diſpoſition 1726.

This appears from *Bargaly*'s letter to *Scott* the writer, dated 2d *February* 1728, and recited in part in the petition; wherein *Bargaly*, after mentioning his ſending to *Scott* Laird *Heron*'s back bond, and that the diſpoſition 1724 to *Heron*, was only to ſecure what he owed to him, the letter goes on in this manner: "Now as to the nature of the diſpoſition you are to "conceive in favours of my ſon, he is to enjoy it, as I have "done myſelf, all the days of his life, and to diſpoſe of it "at his death, or any time in his lifetime, to which of his "ſons he thinks moſt deſerving." Then follows theſe words, which are omitted in the recital of the letter in the petition; "*without any limitation on* Andrew *his ſon's part* (*i. e.* the re- "ſpondent) *if his father finds him inclinable to that way of liv-* "*ing.*"

In the *next* place, this appears from a ſcroll or copy of the diſpoſition itſelf, produced by the petitioner, and wherein the lands are diſponed "to and in favours of Captain *Patrick Heron* my ſon; and in caſe of his deceaſe, *to* Andrew Heron "*his ſecond lawful ſon*, and the heirs male of his body; which "failing, to the ſaid Captain *Patrick* his other heirs whatſoever "in fee, *&c.*"

It will afterwards be explained in what manner the petitioner

ner got into his cuſtody the aforeſaid ſcroll of the diſpoſition 1728, and how it came to be produced in this action.

The next deed in order of time which appears to have been executed by *Bargaly*, is the diſcharge and renunciation, dated 18th *January* 173[illegible], ſuppoſed to have been granted by *Bargaly*, and found cancelled in his repoſitory after his death.

This renunciation is mentioned and argued upon in the petition, but is imperfectly ſet forth: It recites the back bond 1724, and thereafter ſubſumes in theſe words: "And now "ſeeing *Andrew Heron*, my eldeſt ſon, is deceaſed without "male iſſue of his body, and that *Patrick Heron* my ſecond "ſon did oft promiſe and ſolemnly engage to pay up the full "ſums reſting by me to my nephew, with the annualrents "thereof in the terms of the ſaid back-bond within theſe "three years paſt, but has hitherto wholly diſregarded me, "and broke all his promiſes and conditions, whereby I have "no proſpect that he is either in a capacity, or intends to have "the reverſion." Therefore *Bargaly* diſcharges and renounces the back-bond, with this proviſo, "That if *Patrick Heron* "my ſon ſhall, betwixt and *Martinmas* next, pay down to "the ſaid *Patrick Heron* my nephew, in caſh, or otherwiſe to "his ſatisfaction, the foreſaid ſum of 9600 *l.* with the growing intereſt in terms of the ſaid back-bond, now diſcharged, "together with what other ſums I am juſtly due to the ſaid "*Patrick Heron* by bonds or bills apart, in that caſe the ſaid "*Patrick Heron*, my nephew, ſhall be bound to denude and "diſpone the ſaid lands, in the preciſe terms of the ſaid back "bond."

Heritable bond by Bargaly to Heron.

Jan. 6. 1738.

In 1738, the diſpoſition and other ſecurities which had been granted by *Bargaly* to Laird *Heron*, were all innovated, and an heritable bond granted to *Heron* in place of them, which is the laſt deed that appears to have been executed by *Bargaly*, reſpecting his eſtate.—The heritable bond recites the diſpoſition and back bond 1724, with other deeds that had been executed, and then ſubſumes in the following

ing manner: " And ſeeing the ſaid diſpoſition and back " bond, and other deeds above mentioned, were drawn by " me the ſaid *Andrew Heron*, and executed and interchang- " ed betwixt the ſaid *Patrick Heron* and me by ourſelves, " without the intervention of perſons verſant in drawing " writings; and as hitherto, no occaſion has occurred for " uſing either the foreſaid diſpoſition or back bond, they " have lyen over in our reſpective cuſtodies, not conſidered " by either party till now, the woods of *Bargaly* are ready " for cutting, and are to be applied for the ſaid *Patrick He-* " *ron*'s payment; and upon this occaſion, we, the ſaid *An-* " *drew* and *Patrick Herons*, have reconſidered the foreſaid " deeds, and having taken the aſſiſtance of gentlemen of " knowledge in theſe matters, we are adviſed, that the fore- " ſaid deeds are conceived not with that accuracy and " diſtinctneſs as they ought to have been, and that it is " proper they ſhould be innovated in manner after ſpecifi- " ed; therefore, the ſaid *Patrick Heron* has inſtantly deli- " vered up to me the principal diſpoſition, in order to be " cancelled, which I have done at his ſight, and thereby " the back bond granted by him to me, becomes void and " to no effect; and the ſaid *Patrick* alſo delivered up to me, " the ſaid bond and aſſignation for 152 *l. ſterling*; and " the ſaid two bonds granted by *Andrew Heron* my ſon, " with my letter relative thereto, in order to be cancelled or- " diſpoſed of as I ſhall think fit; and it being mutually a- " greed betwixt us, that in place of the ſecurities now can- " celled, I ſhould grant the ſecurity underwritten." Therefore, *Bargaly* grants an heritable bond for the ſums due, and a diſpoſition to the woods in farther ſecurity.

Bargaly died ſome time after granting this heritable bond, when his ſon Captain *Patrick* was in *America*, from whence he never returned, having died at *Annapolis Royal*; ſo that Laird *Heron* was allowed to enter into the poſſeſſion of the eſtate, and continued to poſſeſs it without challenge for ſome conſiderable time.

Andrew Heron, *Bargaly*'s eldeſt ſon was married, and left daughters, who were *Bargarly*'s heirs at law, and would have taken the eſtate, if they had not been barred by the deeds executed by *Bargaly* their grandfather.

The petitioner after his father Captain *Patrick*'s death, conceiving himſelf to have right to the eſtate under the entail 1715, which came into his cuſtody in the manner immediately to be related, granted a truſt bond to his agent *Hugh Crawford* writer in *Edinburgh*, who deduced an adjudication thereon againſt him, and thereafter inſtituted an action of mails and duties againſt the tenants of the eſtate; in which, appearance having been made for Laird *Heron*, a competition enſued, wherein *Heron* pretended right to the property of the eſtate, in virtue of the diſpoſition 1720, an adjudication taken for the money due to him, and a diſpoſition he had procured from the daughter of *Andrew Heron* as the heir of line; but his pleas for the property of the eſtate were over-ruled, and the lands found redeemable; and he, on account of bad behaviour during the courſe of the proceedings, was decreed by the court to pay the expence the petitioner had been put to in the action, which then came to reſolve into a compt and reckoning of *Heron*'s intromiſſions with the rents and woods of the eſtate, and with *Bargaly*'s executry.

The petitioner ſays, that the reſpondent lay by till he ſhould ſee what would become of the action with Laird *Heron*, and when that anſwered to his views, he thought proper to enter his appearance, and under colour of the diſpoſition 1726, to claim a preferable right to the eſtate, purpoſing thereby to reap the fruit of the petitioner's victory over Laird *Heron*, purchaſed at ſo great an expence.

The petitioner's indemnification of the expence has already been taken notice of; and your Lordſhips will judge from what follows, how far the unfavourable inſinuations made againſt the reſpondent's conduct, in lying by until

til judgment was given in the competition between his brother and Laird *Heron*, is well grounded or not.

In the competition with Laird *Heron*, the petitioner had produced the entail 1715, as his title to the eſtate; and it having been averred by *Heron*, that *Bargaly* had executed other deeds of ſettlement ſubſequent to the entail 1715, the petitioner was ordered to exhibit upon oath, all deeds and papers regarding the eſtate; and he deponed, " That " he received the deed of tailzie of 1715, from *Annapolis* " *Royal*, in the year 1753 or 1754, in a box with ſome " other writings, relating to a mortgage which his father " had upon the eſtate of *Richard King*, accompanied by a " letter from Mrs. *Heron*, the widow of Captain *Heron*. " And he particularly depones, *That there was no other pa-* " *pers ſent; nor did the deponent at any time ever receive, or was* " *he poſſeſſed of any other papers relating to the eſtate of* Bargaly: " That Mrs. *Heron* was ſuppoſed to have periſhed at ſea, in " coming to *Britain* from *America*: That he is not poſſeſſed " of any aſſignation by his grandfather, conveying the back " bond granted by *Heron* the elder, to the deponent's bro- " ther; nor did he ever ſee any ſuch, or knows or ſuſpects " where any ſuch may be, but *from circumſtances*, the depo- " nent believeth that if his father had paid the money due " by his grandfather to *Heron*, it was his grandfather's in- " tention to have ſettled the eſtate of *Bargaly upon the depo-* " *nent's brother:* But that as the money was not ſo paid, the " tailzie 1715 ſtood good, *which is the only deed the depo-* " *nent ever ſaw, or knows of by way of ſettlement of the eſtate* " *of* Bargaly, *and that he never had advice or inſtruction as* " *to any deeds of ſettlement executed by his grandfather, other-* " *wiſe than he has above deponed.*

Mr Vining-Heron's firſt depoſition, 1758.

The petitioner, when giving an account to the reſpondent of the proceeding in the actions with laird *Heron*, tranſmitted to him a copy of his letters of correſpondence with his agent *Hugh Crawfurd*, in one of which the petitioner

tioner writes to *Hugh Crawfurd* as follows: " You menti-
" on the defence made by my relations againſt my claim
" to *Bargaly* is, That the lands claimed goes to the heirs of
" line, namely, my couſin: And further, you ſay it will
" be neceſſary to recover the deed of entail, and that it is
" proper for me to find it out. You will forgive me for
" reminding you, that the deed of entail under which I
" claim, *was made by my grandfather the 1ſt* February 1716,
" *and regiſtrate the 9th of the ſame month, at* Edinburgh;
" *by which* Bargaly *is limited to* Andrew *his eldeſt ſon, and*
" *his heirs male;* which failing, to *Patrick* the ſecond ſon,
" and his heirs male, with other limitations. This deed is
" mentioned in many letters of my grandfather's to my fa-
" ther and mother; to the latter of whom he ſays, that he
" hopes the ſettlement made would intice her to come to
" ſee the proviſion made by him to her (my mother) and
" her children. *My couſin, you ſay, intimates a ſubſequent*
" *ſettlement to that I claim under: Surely they do not think I*
" *am to make out their ſuggeſtions in my own prejudice.*"

The above, and other circumſtances, led the reſpondent to inquire very particularly at his brother concerning the deed ſaid to have been executed in his favours; but he met with very unſatisfying anſwers, and therefore, was adviſed to make an appearance in the action between his brother and *Heron*, and to inſiſt for a re-examination of his brother upon oath, which he did accordingly, and his brother de-

Mr. Vining-Heron's ſecond examination 1763.

poned as follows: " That he neither has, nor had any ſet-
" tlement of the eſtate of *Bargaly* made by his grandfather
" in favours of his father Captain *Patrick Heron*, and, fail-
" ing of him by deceaſe, in favours of the memorialiſt."
But he exhibited a paper or writing, indorſed with the following words: " *Scroll diſpoſition*, Heron *of* Bargaly *to Cap-*
" *tain* Heron *in* 1728; purporting to be a draught of a ſet-
" tlement of the eſtate of *Bargaly* upon the ſaid Captain
" *Heron*, and, after his deceaſe, *upon* Andrew Heron *his ſe-*

cond

" *cond ſon.* Depoſed and exhibited a ſchedule or inventory of
" 14 letters that paſſed between this deponent's father n l
" grandfather, and ſome other perſons, together with h:
" ſaid 14 letters themſelves: And depoſed, That it was a-
" bout five weeks ago, and no earlier, that he, this depo-
" nent, diſcovered the ſaid ſcroll and letters now exhibited,
" among ſome parchment writings relative to a mortgage
" which his father had upon the eſtate of one Mr. *King* in
" *Hampſhire;* and which parchment writings, with ſome
" paper writings relative to the ſaid mortgage, had, in the
" year 1752, or 1753, or 1754, after his father's death,
" come to the deponent's hands in a box ſent to him from
" *Annapolis Royal* in *America*, where his father died; but the
" deponent had not minutely examined or ſearched the con-
" tents of the ſaid box, till about five weeks ago, after he
" had received a letter from one Mr. *Wood* at *Halifax*, in
" behalf of a ſiſter of the deponent's, living in *North Ame-*
" *rica*, claiming an intereſt in the ſaid mortgage, and deſiring
" the deponent to make ſearch in the ſaid box for writings rela-
" tive to the ſaid mortgage: That in the year 1758, when he,
" this deponent, did make a depoſition in this ſame cauſe, he
" did not know that the ſcroll of the diſpoſition, or the letters
" now exhibited by him, were contained in the ſaid box,
" tho' the box was then in his cuſtody; *and the deponent*
" *had clearly diſcovered therein a tailzie in* 1715, *and ſent*
" *that tailzie to his agent at* Edinburgh: That the ſaid
" tailzie had been put in the ſaid box with a parcel of pa-
" per writings relative to the mortgage upon *King*'s eſtate,
" all bound together by a piece of tape, and all ſeparately
" indorſed, by reaſon whereof, the deponent eaſily and rea-
" dily caſt his eye upon the ſaid tailzie, and diſcovered the ſame
" ſoon after he had firſt opened the ſaid box. But as to
" the draught of the diſpoſition and letters, depoſed, That
" theſe had been put up in the box incloſed within a large
" parchment writing relative to the mortgage on *King*'s

" eſtate; and being ſo incloſed in the ſaid parchment,
" which was put up with the ſeveral other pieces of parch-
" ment in the ſaid box relative to the ſaid mortgage, eſca-
" ped this deponent's obſervation and diſcovery till the
" time above mentioned, that is, about five weeks ago,
" when the deponent opened out all the parchments, in or-
" der to peruſe the ſame; and incloſed in one of them,
" found the ſaid ſcroll of a diſpoſition, with the letters now
" exhibited by him."

The reſpondent is a phyſician in *London*, and has been very little in *Scotland* for theſe many years paſt; but having received information, that it was probable from the letters that had been produced, that the ſettlement in his favour might poſſibly be in the cuſtody of Mr. *Willis* his father's attorney, he enquired after him, but found he was dead: However, upon a further enquiry, he found Mr. *Willis*'s ſon, who, upon ſearching his father's papers, found and delivered to the reſpondent the diſpoſition 1726.

In this manner did the reſpondent come to the knowledge of, and recover the diſpoſition 1726; and when that is the caſe, he thinks his brother might have ſpared the making any unfavourable inſinuation againſt him, more eſpecially, as his oath in the exhibition might be conſtructed in a manner not very favourable for him.

The reſpondent, upon recovering the diſpoſition 1726, gave immediate notice of it to his brother, who appearing to be ſatisfied that it ſhould have its full effect, the reſpondent did cauſe expede a charter upon it, which he completed by infeftment, as a title for his preference to the property of the eſtate, and for carrying on the action of compt and reckoning with *Heron*; and having reaſon to believe that his brother was not to oppoſe his preference, he produced his charter and ſaſine in the action which then depended before the Lord *Alemoor*; and having moved for an interlocutor of preference, his Lordſhip pronounced one,

whereby

whereby " He preferred the ſaid Doctor *Andrew Heron*, on " his intereſt produced, in and to the lands of *Bargaly*, " and others, and decerned in the preference accordingly." Nov. 30. 1764.

The petitioner ſucceeded to one eſtate by his father, and to another by his mother, the daughter of Mr. *Vining*, a merchant of reputation and wealth at *Portſmouth*; and having improved theſe eſtates to a high degree, by a very ſucceſsful trade, ſo as to be in moſt opulent circumſtances, the reſpondent had not the leaſt apprehenſion that he would ever attempt to deprive him of what benefit could be got from the following out the action with Mr. *Heron*; however, it appears, that he departed from his original, juſt and proper intentions in that matter, and reſolved upon the laying hold of the reverſion of the eſtate of *Bargaly*, if the law would permit him; and having preferred a repreſentation againſt Lord *Alemoor*'s interlocutor, that, with various other writings taken notice of in the petition, came to be adviſed by Lord *Gardenſtoun* upon a remit, and who pronounced an interlocutor, adhering to Lord *Alemoor*'s, which is now ſubmitted to review by the petition. Jan. 21. 1766.

There is one fact which the petitioner has omitted, and which it may be proper to ſtate before proceeding to the argument; it is, that Captain *Patrick Heron*'s wife was drowned, and all the papers and effects with her loſt, when returning from *Annapolis Royal* to *Britain*, ſoon after ſending home to the petitioner the papers mentioned in his oath before recited.

The petitioner, in his argument, has endeavoured to maintain the three following propoſitions: 1*ſt*, That *Bargaly* was effectually denuded of his eſtate by the diſpoſition 1715, and had not powers thereafter to convey it to the reſpondent by the deed 1726.—2*dly*, That the diſpoſition 1726, was executed in the view of a tranſaction with Captain *Patrick*, whereby he was, in effect, to become purcha-

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ſer of the eſtate, by the advancing the money neceſſary for paying Laird *Heron*, which, therefore, required his acceptance; but which he never did accept of, or pay the money, and, conſequently, the diſpoſition became totally evacuated:—And, 3*dly*, That altho' *Bargaly* might have conveyed the eſtate, notwithſtanding the diſpoſition 1715, and that the diſpoſition 1726 had been accepted of by him; yet that it was annulled by the after diſpoſition 1728, and could not be revived by *Bargaly*'s afterwards deſtroying the deed 1728.

The petitioner in his argument upon the *firſt* propoſition, is pleaſed to take it for granted, that the entail 1715, was delivered to Captain *Patrick Heron* prior to the making the entail 1716, becauſe of its being found in his cuſtody; but when doing this, he ſeems to have forgot, that *Andrew*, Captain *Patrick*'s elder brother, was the inſtitute in the entail, to whom it fell to have been delivered, if an immediate delivery was intended; and that there is not the *leaſt evidence* or *circumſtance* which can lead your Lordſhips to think, that ever the entail 1715 was in the poſſeſſion of *Andrew*; on the contrary, ſeveral of the letters annexed to the petition, ſhow, that he ſtood in ſuch a ſituation with regard to his father, that it is not credible his father would intruſt ſuch a paper with him; and indeed, as it is confeſt on all hands, that *Bargaly* was directed, in a great meaſure, in thoſe matters, by the Laird of *Heron*, it is not probable, that he who ſeems to have had a ſtrong deſire of coming at the property of the eſtate, would have allowed *Bargaly* to deliver the entail 1715 to either *Andrew* or *Patrick*, if ſuch delivery was to have the effect of depriving him of the power of the diſpoſal of the eſtate, which the reſpondent can by no means admit of.

But, in the next place, the only evidence we have of the entail 1715, ever having been in the cuſtody of Captain *Patrick*, is the oath of the petitioner himſelf, who ſays, that

it

it was ſent to him in the manner deſcribed in his oath above recited, by Captain *Patrick*'s widow; but ſuppoſing the petitioner's oath to be legal evidence in this matter, it will not from thence follow, that the deed was delivered prior to the making the entail 1716; becauſe there is nothing more natural to preſume, than that Captain *Patrick* might have got the entail 1715 from his father, when he was at home in the 1726, and got the diſpoſition executed in that year; and it will not eſcape obſervation, that the delivery then, could not poſſibly be intended to render that deed effectual againſt the diſpoſition 1726, as *Andrew* the eldeſt brother was then alive, into whoſe cuſtody it appears never to have come.

Again, the very executing of the entail 1716, affords of itſelf the ſtrongeſt preſumption, that the entail 1715 was then in *Bargaly*'s cuſtody, for they are both wrote with his own hand, and the one is a tranſcript from the other, with ſome variations only in favours of the laird of *Heron*; and, indeed, all the ſubſequent deeds executed by *Bargaly*, have the ſame tendency to ſhow, that he was not diveſted of his eſtate by the entail 1715.

But, in the *laſt* place, The reſpondent denies, that the delivery of the entail 1715, either to *Andrew* or *Patrick*, could deprive *Bargaly* of the power of altering that ſettlement by any ſubſequent deed.

Altho' the entail 1715 is executed in the way of a diſpoſition of the lands to *Andrew*, and the other heirs of entail, yet it is plainly no more than a gratuitous ſettlement of the eſtate; and the reſpondent is adviſed, that there is nothing better underſtood in law, than that all ſuch ſettlements may be revoked and determined, at any time before they are completed by infeftment.—And it was adjudged in the caſe between the Earl of *Moray* and Lord *Roſs*, with regard to the entail of the eſtate of *Balnagown*, that ſuch a deed of ſettlement might be altered by the maker, with

conſent of the inſtitute, even after it was completed by infeftment.

The reſpondent might argue, that the powers reſerved in the entail 1715, were ſufficient for authoriſing an alteration in the ſettlement, had it even been completed by infeftment, as *Bargaly* did, in effect, remain proprietor; but he has no occaſion to argue this point; for, as it cannot be controverted, that the laſt ſettlement of an eſtate, is a virtual revocation of any prior ſettlement, ſo far as they are inconſiſtent with each other; ſo the entail 1715 being revoked by the entail 1716, and the reſerved powers on that entail being as ample as they could be made, *Bargaly* was at full liberty to execute the diſpoſition 1726.

It is ſaid in the petition, that the reſpondent has admitted, that if the entail 1715 was delivered, *Bargaly* had not power thereafter to diſpoſe of his eſtate by the diſpoſition 1726.

This is a miſtake in the petitioner, the reſpondent never admitted any ſuch thing; but, on the contrary, did, in all the papers before the Lord Ordinary, maintain, that as the entail 1715 was a *gratuitous ſettlement*, executed *cauſa mortis*, for regulating the ſucceſſion of his eſtate after his death, he had it in his power to alter it at any time before it was completed by infeftment; and this is a thing which does not occur to the reſpondent ever to have been diſputed or doubted of in this court; but, indeed, there is little occaſion for inſiſting on this point, becauſe the preſumption founded upon by the petitioner of the delivery, from poſſeſſion, is not applicable to this caſe; and, indeed, if Captain *Patrick* had even been the inſtitute in the entail, the circumſtances of the caſe are ſufficient for convincing every perſon, that the entail 1715 was in *Bargaly*'s cuſtody, when he executed the entail 1716; and, at any rate, there is not the leaſt veſtige of evidence, from whence it could be inferred, that the diſpoſition 1715 was ever delivered to, or was in the poſſeſſion of *Andrew Heron*, *Bargaly*'s eldeſt ſon.

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The *ſecond* propoſition reſpects the validity and effect of the diſpoſition 1726, challenged on account of the want of acceptance on the part of Captain *Patrick Heron;* with regard to which, the reſpondent begs leave to offer the following obſervations in ſupport of that deed, and in anſwer to the argument in the petition.

1*mo*, As the fee of the eſtate was directly conveyed to the reſpondent, the validity and effect of the diſpoſition 1726, ſo far as concerned the reſpondent, could not be hurt or impeached by Captain *Patrick*'s not acceptance of the diſpoſition.—The conveying the fee to the reſpondent, was an act of the will of *Bargaly*, and which appearing now to be the *ultima voluntas*, as no later deed has appeared, muſt govern his ſucceſſion.

2*do*, The letters annexed to, and founded on in the petition, in whatever terms they had been conceived, cannot be held as legal evidence of Captain *Patrick Heron*'s intention to reject the diſpoſition 1726, becauſe none of theſe letters are wrote by him.

3*tio*, All thoſe letters do concern the deed propoſed to have been executed in the 1728; but do not reſpect the diſpoſition 1726, which was executed prior to the dates of any of thoſe letters.

4*to*, Captain *Patrick*'s not paying up the money due to *Heron*, did not ariſe from his unwillingneſs to accept, either of the diſpoſition 1726, or intended diſpoſition 1728; but from *Heron*'s having demanded payment of 1142 *l.* 8 *s.* 2 $\frac{1}{2}$ *d.* *Sterling*, in place of the 950 *l.* mentioned in the diſpoſition 1726.—This appears, *firſt*, From an accompt ſigned by *Heron*, and dated the 24th *June* 1728, wherein he makes *Bargaly* debtor to him in 1142 *l.* 8 *s.* 2 $\frac{1}{2}$ *d.* 2*dly*, From a letter of Laird *Heron*'s to Captain *Patrick*, wherein he writes, "I ſhall not here notice what you are pleaſed to ſay about "my *accumulating intereſts*, &c." And, 3*dly*, It appears from Laird *Heron*'s letter to Captain *Patrick*, dated the 19th *July* 1728,

1728, and annexed to the petition, that Captain *Patrick* had been making objections; for *Heron*, in that letter, complains of his ſtarting *ſuch objections* when the time of payment was come. What theſe objections were, other than theſe mentioned, cannot with certainty be known, unleſs Captain *Patrick*'s letters complaining of *Heron*'s accumulating intereſts, *&c.* and demanding more than was ſtipulated, had been produced.

5*to*, It is evident from ſuch of the letters as have been produced, that Captain *Patrick* did accept of the diſpoſition 1726, and of the diſpoſition 1728, if it ever was executed. This diſ-

Excerpts, p. 25. poſition appears, 1*ſt*, From *Scott* the writer's letter, wherein he writes to Captain *Patrick* as a perſon wanting Laird *Heron* to denude of the eſtate, which he was not intitled to have demanded, unleſs by the authority of one or other of the diſpoſitions. 2*dly*, From Laird *Heron*'s letter to Captain *Patrick*, dated the 19th *July* 1728, complaining of his not ſtarting his objections when he *received the ſeveral deeds*. 3*dly*, From Laird *Heron*'s letter to Captain *Patrick*, dated 20th *March* 1728-9, wherein there is the following paragraph:

Excerpts, p. 33. "If you delay the bargain, pleaſe ſend your father *the two* "*rights in your favour*, and bond of redemption, which will "pleaſe him and me equally well, as if you had paid the "money."

6*to*, It is abſurd to treat the diſpoſitions 1726 and 1728, as a ſale depending upon the acceptance of Captain *Patrick* as a

Excerpts, p. 27. purchaſer; becauſe Laird *Heron* has, in his letter to Captain *Patrick*, dated 19th *July* 1728, expreſly ſaid, *that the woods upon the land is worth more than he, Captain* Patrick, *was to pay*. And the ſame thing in ſubſtance is ſaid in *Bargaly*'s own letter to his ſon, dated the 8th *December* 1730, wherein he ſays,

Excerpts, p. 35. "I am offered for my wood 1000 *l. Sterling*, and he is not to "touch a fir in the bargain."

7*mo*, By the terms of the back bond 1724, *Bargaly* could not be diſtreſſed by *Heron*, as the only conſequence of not paying the money, was the accumulation of intereſt; and therefore,

fore, it is probable, when Captain *Patrick* found he could not ſettle matters with Laird *Heron*, on what he apprehended to be equitable terms, he came to the reſolution of poſtponing payment. And altho' *Bargaly* ſeems to have been ſomewhat fretted with this at firſt, and wrote warmly to his ſon upon the ſubject; yet he came at laſt to be in ſome meaſure reconciled to the delay, from whatever cauſe it proceeded, as appears from his letter to his ſon, dated the 8th *December* 1730. Excerpts, P. 35. And from this period to *December* 1739, when *Bargaly* died, there are no letters produced.

8*vo*, The delivery of the diſpoſition 1726 to Captain *Patrick*, and his retaining it, and *Bargaly*'s not making any other later ſettlement, clearly inſtructs the conſent both of the one and the other, that the eſtate was to be conveyed by that deed, and, as has already been obſerved, this did not depend upon the acceptance or non-acceptance of Captain *Patrick*, the diſpoſition having conveyed the fee of the eſtate to the reſpondent, who muſt therefore be intitled to take it with the burden of the debt due to Laird *Heron*.

It is ſaid in the petition upon this head, "That if a diſponee repudiates, or does not accept of a deed conceived in his favours, the ſubſtitute under that deed cannot take."

The reſpondent has no occaſion to impugn this poſition of the law, not only becauſe Captain *Patrick* was not the diſponee by the diſpoſition 1726, he being only *liferenter*, but becauſe, *de facto*, it does appear, that he did accept of the diſpoſition 1726, and alſo of the diſpoſition 1728, if ever any ſuch was executed.

It is likewiſe ſaid in the petition, "That the deed of 1728 would have been moſt abſurd, if the deed of 1726 had already been accepted of; as, upon that ſuppoſition, *Bargaly* would have been totally denuded of the eſtate, and conſequently, would have had no power to have made another diſpoſition thereof."

The diſpoſition 1726 was gratuitous, and being intended as a ſettlement of the eſtate, might have been altered by *Bargaly* at pleaſure, and would have moſt effectually been altered by the intended diſpoſition 1728, if any ſuch had been executed; and as Captain *Patrick* was to get the fee, and the reſpondent only a hope of ſucceſſion by that deed, it muſt have been more agreeable to Captain *Patrick* than the deed 1726; and therefore, there was no abſurdity in his deſiring to have ſuch a deed executed: But as ſuch deed does not now appear, it cannot with juſtice be argued, from the letters of correſpondence, that Captain *Patrick* did repudiate the deed 1726.

The petitioner, under his *third* propoſition, maintains, that the diſpoſition 1726, tho' accepted of, was vacuated and annulled by the after deed of 1728, and could not be revived by the deſtruction of that deed, unleſs it could be proved, that the deed 1728 had been deſtroyed *eo in intuitu*, to revive the prior deed 1726, which, *in dubio*, cannot be preſumed.

This is a doctrine hitherto unknown to the reſpondent, who has been learned to underſtand, that if two deeds of ſettlement are executed at different periods of the ſame eſtate, the laſt will imply a revocation of the firſt, ſo far as it is inconſiſtent with it; but that when the laſt is deſtroyed by the maker, the firſt is thereby revived, and allowed to remain in full force.

This is ſo much founded in good ſenſe and reaſon, that it would require a very clear authority in the law, to eſtabliſh a contrary rule; and from the nature of the thing, evidence cannot be required to inſtruct, that the one deed was deſtroyed to give effect to the other, becauſe the preſervation of the laſt deed proves that as effectually, as the making of a new deed of ſettlement different from a former one, proves an intended alteration of the former.

And therefore, if a deed was executed in the 1728 by *Bargaly*, agreeable to the ſcroll produced by the petitioner, it muſt

muſt be preſumed, to have been deſtroyed to give effect to the diſpoſition 1726. Such muſt be the preſumption in the law; and, if the petitioner maintains the fact to be contrary, he muſt prove it.

The petitioner has founded upon his father's diſcharge and renunciation to *Bargaly* in 1731, as evidence of Captain *Patrick*'s having repudiated the diſpoſition 1726; but upon a fair conſtruction of the narrative of that deed which has been recited above, it proves the very reverſe, as it ſhows, that *Bargaly* was diſobliged at Captain *Patrick*'s not having paid the money to *Heron*, which was a thing underſtood when the diſpoſition 1726 was executed.

The petitioner has argued upon a letter from Laird *Heron* to Captain *Patrick*, wherein he mentions the former having wiſhed him much joy of his purchaſe, as evidence alſo of Captain *Patrick*'s having departed from any right of the diſpoſitions he had got.

The reſpondent has already ſuggeſted one anſwer to this, to wit, that as the fee is diſponed to him by the diſpoſition 1726, the validity and effect of the deed did not depend upon his father's acceptance or repudiation of his intereſt in that deed. But there is another anſwer equally ſufficient, namely, that Captain *Patrick* might have been a party in the ſale, if any ſuch thing was intended; and the reſpondent will beg leave to add this third anſwer, that Laird *Heron*'s letter is not legal evidence of what was wrote by Captain *Patrick*; and that, altho' it was evidence, the purchaſe ſpoke of might have been connected with, and depending upon circumſtances which the reſpondent has no acceſs to know any thing of.

The petitioner, in the *laſt* place, has founded upon the heritable bond granted by *Bargaly* to Laird *Heron*, for the ſum then due to him, as evidence of *Bargaly*'s not underſtanding himſelf to be denuded of the eſtate by the diſpoſition 1726.

The reſpondent will very readily agree, that *Bargaly* would moſt probably not underſtand himſelf to be denuded by the diſpo-

diſpoſition 1726: And it is apprehended, that he was right in thinking ſo; for if that diſpoſition, tho' conceived in diſpoſitive words *de præſenti*, yet it was evidently a gratuitous ſettlement of the eſtate; and therefore, till it was at leaſt completed by infeftment, *Bargaly* was deprived of no power over the eſtate. But independent of this, the granting of the heritable bond was intirely conſiſtent with the diſpoſition 1726, in whatever light it is taken, and indeed calculated to give effect to that ſettlement, becauſe the bond was only an adjuſtment of the quantity of debt that muſt be paid out of the eſtate to Laird *Heron*: And the tranſaction was profitable for the reſpondent, as he thereby got clear of the fetters that was intended in favour of Laird *Heron*'s family by the back bond of 1724.

The petitioner is pleaſed to ſuppoſe, that the diſpoſition 1726, and the intended or executed diſpoſition 1728, were the effect of contrivance between *Heron* and *Bargaly*, for operating *Heron*'s payment from Captain *Patrick*: But the very terms of the diſpoſition 1726, in ſettling the fee upon the reſpondent *nominatim*, are repugnant to this idea, and plainly ſpeak out, that *Bargaly* was deſirous to have his family repreſented in the perſon of the reſpondent, and his eſtate enjoyed by him: And as he has executed a regular and complete deed for that purpoſe, it is hoped your Lordſhips will ſee no juſt reaſon for refuſing effect to it.

In reſpect whereof, &c.

JA. MONTGOMERY.